NORTON ROSE FULBRIGHT

ACC Association of Corporate Counsel HOUSTON

Game Show: Can you spot the ethical choice?

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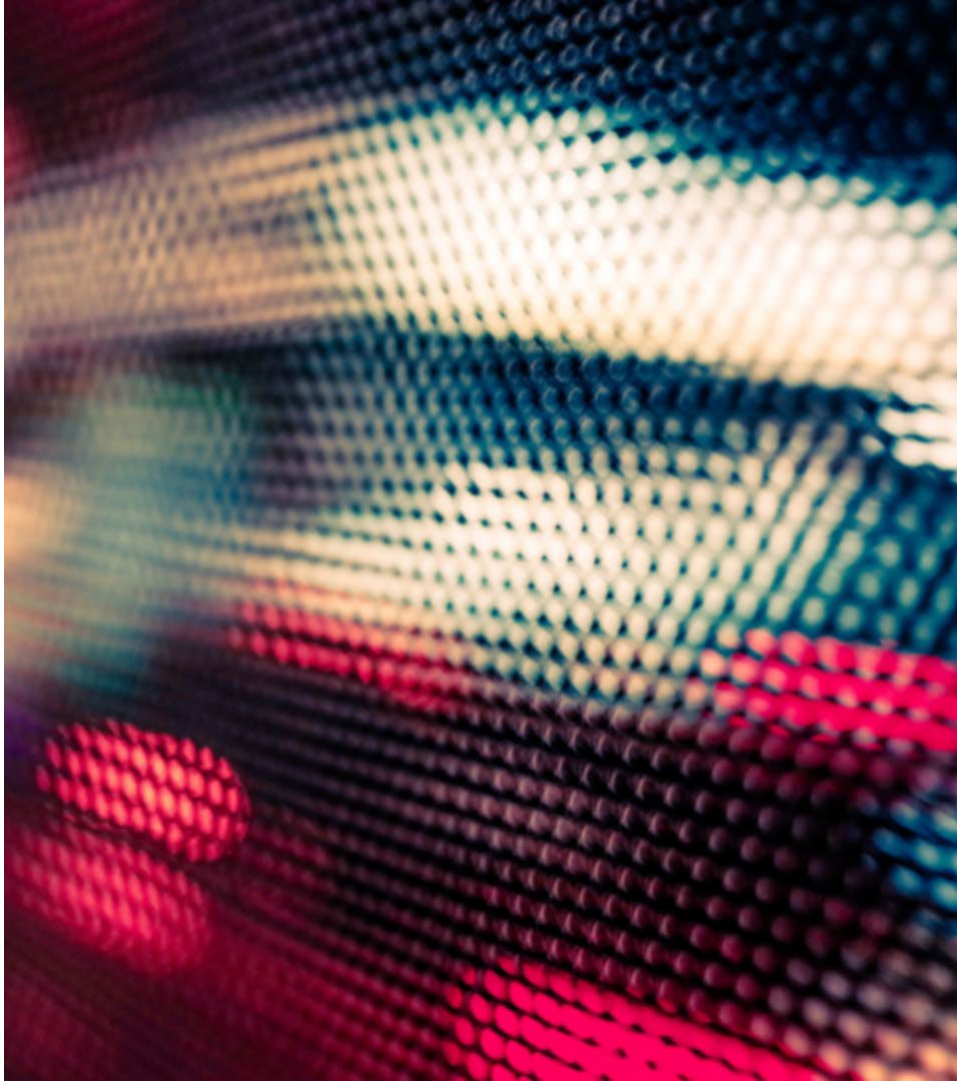


Fact Pattern 1

Guns N' Roses hires you to get an *ex parte* TRO against a brewery using the name "Guns N' Rose's Shotgun Beer." The band owns the "Guns N' Roses" trademark and has its own company that sells band merch. Axl tells you that this is the third time he has tried to enjoin the brewery, and each time Gn'R has lost because of a wonky C.D. Cal. decision. Axl says he has an appetite for destruction of these infringers and wants to file in his home state of Indiana in the 7th Circuit. He instructs you not to mention the California case to the judge when you apply for the *ex parte* TRO. "Just use your illusion," he says as he leaves.

Question 1

Can you follow Axl's instruction?

A. Yes, because a California federal court decision is not controlling authority in the 7th Circuit.

B. Yes, because a lawyer must be a zealous advocate and follow client instructions so long as they are not illegal.

C. No, because the case is directly adverse legal authority, even if not controlling.

D. No, because the federal decision is material.

Question 1

Can you follow Axl's instruction?

D.

No, sweet child o' mine, because the federal decision is material.

Explanation

Rule 3.3: Candor Toward the Tribunal

(a) A lawyer shall not knowingly . . . (2) fail to disclose to the tribunal legal authority in the **controlling jurisdiction** known to the lawyer to be **directly adverse** to the position of the client and **not disclosed by** opposing counsel.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of **all material facts** known to the lawyer that will enable the tribunal to make **an informed decision**, whether or not the facts are adverse.

Fact Pattern 2

Former Theranos, Inc. CEO, Elizabeth Holmes, is being sued by stockholders for securities fraud for statements she made about the Company's Edison, touted as a near-market-ready miracle immunoassay machine that can detect 80+ diseases from a single blood drop. In fact, it was completely ineffective. Holmes, your friend from college, where you both idolized Steve Jobs, approaches you about representing the Company. You do not have much experience in securities litigation, however, as you've spent the last several years handling product liability cases. This does not bother Elizabeth, naturally, who thinks you can get ready in time.

Question 2

Can you take on the case for Theranos?

A. No. You have no experience in this area of law.

B. No. You can't represent the Company because the former CEO is your friend and a conflict might arise.

C. Yes. A law license allows you to practice any area of law.

D. Yes. But you should bring in or consult with an attorney who has experience in this field as well.

Question 2

Can you take on the case for Theranos?

D.

Yes, Elizabeth is right, for once, so throw on a black turtleneck, lower your voice, and definitely bring in or consult with an attorney who has experience in this field.

Explanation

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, ***relevant factors*** include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and ***whether it is feasible to*** refer the matter to, or ***associate or consult with, a lawyer of established competence in the field in question***. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required ***in some circumstances***.

Fact Pattern 3

You represent Meta Platforms, Inc., the publicly traded company formerly known as Facebook. Meta has been sued in a shareholder derivative suit claiming it underreported losses attributable to personal injury settlements with Gen X users injured running into furniture while wearing Meta's Oculus virtual reality headsets. Mark Zuckerberg comes to you and asks, "Can we meet later? I'm concerned that I have been personally named in this lawsuit and want you to figure out how to protect my $100 million, 700-acre estate in Kauai in case this whole thing goes south."

Question 3

How should you respond?

A. Schedule the meeting, since Zuckerberg is a co-defendant and interests in defeating liability are aligned.

B. Schedule the meeting, since you are subordinate to Zuckerberg and no clear conflict exists.

C. Decline the meeting, explaining that Zuckerberg is not your client.

D. Decline the meeting, explaining that Zuckerberg will need to sign an engagement letter first.

Question 3

How should you respond?

C.

Move fast and break things to get away from this thumbs-down proposition. You should decline the meeting and explain to Zuck that the Company is your client; he, individually is not.

Explanation

Rule 1.13: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer ***shall explain the identity of the client*** when the lawyer ***knows or reasonably should know*** that the organization's interests ***are adverse*** to those of the constituents with whom the lawyer is dealing.

You represent Peloton, the fitness company recently in the news for personal injury claims, a marketing fumble, and falling stock prices. Peloton is defending against a hostile takeover bid. Outside, after a strategy meeting, one of Peloton's Vice Presidents tells you that this is all a ploy by the CEO of iFit, a rival company run by the man the VP's wife used to date. The VP jumps on an actual bike, concealed weapon in plain sight, and rides in the direction of iFit's HQ while yelling "iFit's CEO can't take over anything – if he no longer exists."

Must you disclose that Peloton's VP may be headed to take out iFit's CEO?

A. No, because you do not know for sure where he is headed.
B. No, because you do not know if he will actually follow through.
C. No, because there is no duty to disclose confidential information.
D. Yes, because this guy could kill somebody.

Must you disclose that Peloton's VP is headed to iFit?

C.

No. Don't get dragged under this treadmill because there is no duty to disclose this confidential information.

Rule 1.6: Confidentiality of Information

(b) A lawyer ***may*** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent ***reasonably certain*** death or substantial bodily harm;

[6] Although the public interest is ***usually*** best served by a ***strict rule*** requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and ***permits disclosure*** reasonably necessary to prevent ***reasonably certain death or substantial bodily harm***.

Jim Crane, Houston Astros owner, is suing Major League Baseball for lost profits from the League's failure to negotiate a contract with the players in time for the 2022 season. One day, he tells you that the MLB HR director has a treasure trove of factual data that the League's defense attorneys do not know about and have failed to produce – despite your reasonably tailored requests. He instructs you to call the HR director with a specific list of questions to ask. If that doesn't work, he says, he knows a data entry employee you can call who may know what the data reflects. Can you?

Are you allowed to talk to the HR director?

A. Yes, because the director is not a party.
B. No, because the director is a potential defendant.
C. No, because the director is a manager.
D. No, because the director may reveal confidential Company information.

Are you allowed to talk to the HR director?

C.

No. You must take this pitch, because the director is a manager and is thus considered part of the opposing party represented by counsel.

Are you allowed to talk to the data entry employee?

A. Yes, because the data entry employee is not a manager.

B. Maybe, depending on where the data entry employee is located, her specific role at MLB, and her involvement in the litigation.

C. No, because the data entry employee is a potential defendant.

D. No, because the data entry employee may reveal confidential MLB information.

Are you allowed to talk to the data entry employee?

B.

Maybe. This ball is a slider and you swing at your own peril. Check state law before stepping into the box. The answer will vary depending on where the data entry employee is located, her specific role at MLB, and her involvement in the litigation.

Rule 4.2: Communication with Person Represented by Counsel

Transactions With Persons Other Than Clients

In representing a client, a lawyer shall not communicate about the subject of the representation ***with a person the lawyer knows to be represented by another lawyer*** in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

[7] In the case of a represented organization, this Rule prohibits 1) communications with a constituent of the organization who ***supervises, directs or regularly consults with the organization's lawyer*** concerning the matter or 2) has authority to obligate the organization with respect to the matter or ***whose act or omission*** in connection with the matter for purposes of civil or criminal liability. 3) Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

Communications with Current Employees:

Control group: No

Others: Varies by state

Example: *Ex Parte* contact prohibited only with employees who

- Exercised managerial responsibility in the matter
- Alleged to have committed the wrongful acts
- Have authority to make decisions about the litigation

Neil Young, famous singer/songwriter and inexplicable Darryl Hannah paramour, strongly disagrees with Joe Rogan, a podcaster also on Neil's contracted streaming platform, Spotify. Neil asks Spotify to remove his music from the platform if it won't stop airing Rogan's podcast.

Neil also asks you to negotiate for him a marketing package from Google that uses the Rogan podcast tagline and name as keywords. Then, whenever anyone tries to Google the Rogan podcast, Neil's name and website will show up first. When you raise the question of whether the move would be appropriate, Neil says "Yeah, I've been in my mind. It's such a fine line. But I want you to go for it!"

Are you prohibited from negotiating this package by ethics rules?

A. Yes, because you are being deceitful.

B. Yes, because your conduct would show a lack of fairness or straightforwardness.

C. No, because keywords are not covered by ethics rules.

D. Maybe, but only if your conduct is viewed as involving dishonesty, fraud, deceit or misrepresentation.

Are you prohibited from negotiating this package by ethics rules?

D.

Maybe. Neil, an old pot-smoking hippie looking for a heart of gold, may be able to get away with this scheme on his own behalf, but if your conduct, as an attorney, is viewed as involving dishonesty, fraud, deceit or misrepresentation, it is prohibited.

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:
(c) engage in conduct involving ***dishonesty, fraud, deceit or misrepresentation***;

Note: Texas has an ethics opinion allowing this while North Carolina has an opinion with the opposite conclusion.

Your client, Tom Brady, is being sued by a New England Patriots football deflator for intentional infliction of emotional distress. The Deflator claims Tom texted him, telling him to underinflate game day balls. The Deflator's Galaxy Note with these texts caught on fire on a flight, so he demands Tom produce them. Despite your best collection efforts, a cache of texts Tom sent to the Deflator was "accidentally" omitted from the documents Tom gave you and, as a result, from the production. Tom's "people" subsequently deleted the texts during a "phone update." Opposing counsel moves for spoliation sanctions. When you tell Tom, he laughs and says, "Don't you know?? I'm Tom Brady!"

Is Tom subject to sanctions under the current Federal Rules?

A. Yes, because the texts were intentionally deleted.
B. Maybe, if Tom is found to have acted in bad faith and the texts cannot be replaced.
C. Maybe, if Tom acted unreasonably, the texts cannot be replaced, and the plaintiff will be prejudiced.
D. No, because he's Tom Brady.

Is Tom subject to sanctions under the current Federal Rules?

C.

Maybe. Even Tom Brady could be sanctioned if he or his people acted unreasonably, the texts cannot be replaced, and the plaintiff will be prejudiced.

Explanation

FRCP 37 (e) Failure to Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) presume that the lost information was unfavorable to the party;

(B) instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) dismiss the action or enter a default judgment.

You are in-house counsel for Old School Ventures, a national hot rod manufacturer that requires that you attend Employment Committee meetings as a non-voting member. At the most recent meeting, the Committee decides to terminate Jules, a non-binary, trans employee, for “not behaving professionally.” Jules sues Old School for discrimination and wrongful termination and seeks production of the Committee notes, to get to the bottom of the reason for the firing, which they believe is because the CEO doesn’t like them. The Committee claims the meeting notes are privileged because they reflect the Committee’s discussions and deliberations, during which you provided legal advice.

Are the notes privileged?

Are the notes privileged?

No, the notes are not privileged.

A. The Court held the Committee's primary function was termination of the employee.

B. Legal review of the Committee's actions was only incidental to primary business function.

C. The fact that in-house counsel was a non-voting member was not a significant factor in determining whether he was acting in legal or non-legal capacity.

D. The Court expressed concern that the Company "used in-house counsel to cloak otherwise unprivileged business advice . . ."

In-house counsel must be performing a legal task, and their presence alone will not transform business advice into protected legal advice.

Neuder v. Battelle Pacific Northwest National Laboratory, 194 F.R.D. 289 (D.D.C. 2000)

You represent Kayne West, who is going through a possible nervous breakdown and a definite difficult divorce from Kim Kardashian. Kayne gives you an advance copy of his new album, Donda 17. He explains it is not finished, asks you not to let anyone listen to it, and requests you return it the next day. That night, you go home and tell your wife, a huge Ye fan, about the CD and how you got it. You both listen to it together. The next morning, you feel horribly guilty and wonder if you violated ethical rules.

Must you report your conduct to the Bar?

A. Yes, because you revealed confidential information without client approval.
B. Yes, because the CD related to the representation.
C. No, because spousal immunity applies to reporting obligations.
D. No, because the disclosure does not raise substantial questions of your honesty or fitness.

Must you report your conduct to the Bar?

D.

No, the disclosure to your wife does not raise substantial questions of your honesty or fitness. Disclosure to Taylor Swift, however, would be a different story.

Explanation

Rule 8.3: Reporting Professional Misconduct

Maintaining The Integrity of The Profession

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a **substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects**, shall inform the appropriate professional authority.

You represent a class of Washington sports fans who have sued football team owner, Daniel Snyder, for completely botching the team's rebranding. The fans begged to keep the current name, "the Washington Football Team," but Snyder instead chose the "Commanders," which fell flat. The change has caused the class extreme emotional distress and needless expense in the form of purchase of new jerseys. The class also seeks refunds on their season tickets, and their spouses seek loss of consortium.

During the class representative's deposition, he berates opposing counsel, shouting obscenities and threatening to give opposing counsel a Joe Theismann-style broken leg. Stunned, you don't say anything and sit by quietly.

Have you violated any ethical rules?

A. No, your client is responsible for his own conduct.

B. No, opposing counsel decided to proceed rather than terminate the deposition and seek a protective order.

C. Yes, you should have intervened.

D. Yes, you had a duty to intervene the very moment the deponent's tone became unfriendly.

Have you violated any ethical rules?

C.

Yes, you should have intervened. In addition to being imprudent, your failure to block here will get you and your client both sacked.

You have a duty to intervene in this scenario. An attorney may not “sit back, allow the deposition to proceed, then blame the client when the deposition process breaks down.”

This is based on a real case out of Pennsylvania. The deposition of Defendant’s owner and CEO lasted nearly 12 hours. Though case was a breach of contract and tortious interference case, the deponent used the word “contract” only 14 times. However, he used expletives 73 times!

The court issued a 42-page sanctions order condemning

Hostile, uncivil, and vulgar conduct
Impeding, delaying, and frustrating fair examination
Failure to answer and intentionally evasive answers

The defendant and his attorney were ordered to pay, jointly and severally, $13,026, representing the fees and expenses incurred in connection with the motion to compel and $16,296, representing the expenses and 75% of the fees incurred by defendant in connection with the deposition.

You are in-house counsel at Bring Home the Bacon and Fry It Up in a Pan, LLC, a social media company which helps women have it all. Your Company has been sued by a former male employee on a hostile work environment theory: he claims the female CEO thought she could have it all, and him too. The CEO tells you that she isn't worried about the case because the judge assigned to the case is her best friend's mother-in-law, with whom she exchanges holiday cards every year. She also says, "Be sure not to mention this fact to opposing counsel. Sisters are doing it for themselves!" she exclaims.

Must the judge disqualify herself from the case?

A. Yes, so long as she remains an acquaintance.
B. Yes, but only if they maintain a friendship.
C. Probably not, because they are only acquaintances.
D. Probably not, because they are close personal friends.

Must the judge disqualify herself from the case?

C.

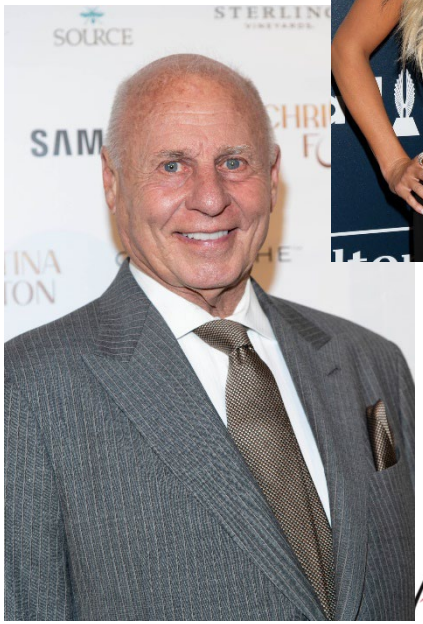
Probably not, because they are only acquaintances. So, give the judge some R-E-S-P-E-C-T because she is likely to be your presiding judge.

On 9/5/19, the ABA Standing Committee on Ethics and Professional Responsibility released detailed recommendations on when judges should decide to disqualify themselves.

Formal Opinion 488 explores three categories of relationships — acquaintances, friendships and close personal relationships — to assist judges in determining what, if any, ethical obligations those relationships create under Rule 2.11 of the ABA Model Code of Judicial Conduct.

Judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties. Whether judges must disqualify themselves when a party or lawyer is a friend or shares a close personal relationship with the judge or should instead take the lesser step of disclosing the friendship or close personal relationship to the other lawyers and parties, depends on the circumstances.

Tom Girardi, LA personal injury lawyer extraordinaire, has been sued for misappropriating millions in client funds. His wife, Erika Girardi, also known as Erika Jayne, is a singer and Real Housewife extraordinaire. She, too, is being sued for participating in the scheme. E! News reports that Erika is, in fact, the mastermind, and Erica sues E!. On the eve of trial, E!'s litigator holds a press conference, claims that the suit is groundless, everyone knows Erika is nuts, she is linked to numerous fraud schemes, and she *must* have set this one up, too. The press conference goes viral on social media.



Is this a violation of ethics rules?

A. Yes, because an attorney is prohibited from making an extrajudicial statement that he knows will have a substantial likelihood of materially prejudicing a trial.

B. No, unless a prospective juror in *voir dire* admits to hearing it.

C. Yes, because an attorney is not allowed to make any comments to the press if trial is imminent.

D. No, because everyone knows that Erika Jayne *is* nuts.

Is this a violation of ethics rules?

A.

Yes, because an attorney is prohibited from making an extrajudicial statement that he knows will have a substantial likelihood of materially prejudicing a trial. And, believe it or not, Real Housewives are not defamation-proof as a matter of law.

Explanation

Rule 3.6: Trial Publicity

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be ***disseminated by means of public communication*** and will have a ***substantial likelihood of materially prejudicing*** an adjudicative proceeding in the matter.

Explanation

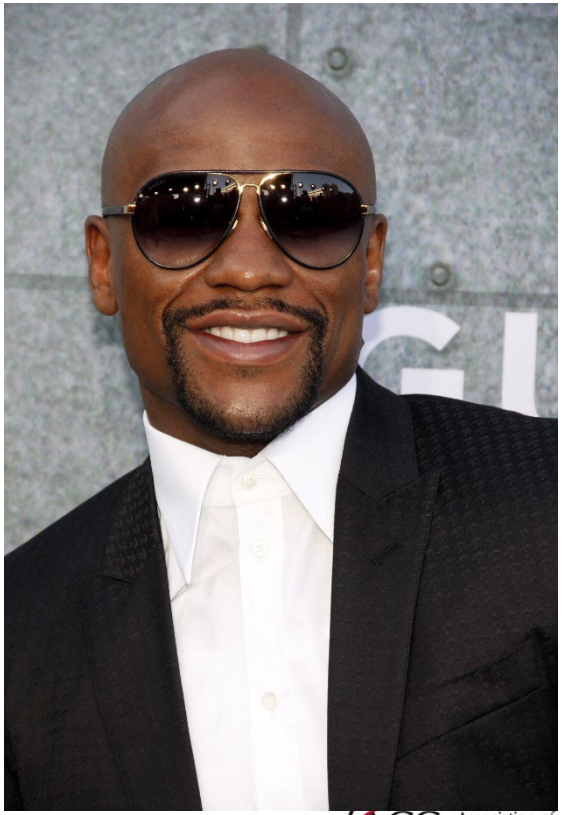
[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party . . .

Explanation

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, ***the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates***.

50 Cent and Snoop Dogg, after a “smoking” Super Bowl performance, are rumored to be releasing a new album on May 13th. You represent Floyd Mayweather, Jr., a boxer who is known to have a public feud with Fiddy on a possible return to the ring. Over lunch as you chat, Mayweather tells you that he is bribing one of Fiddy’s inner circle dance crew to give him copies of the upcoming album. He says, “I will sell it to the highest bidder before they drop the album and release it on the net. Good thing you’re my lawyer so you can’t tell anyone. Hit, don’t get hit, I always say.”



Is Floyd Mayweather, Jr. right?

A. Yes, you cannot reveal confidential client information under these circumstances.

B. Yes, because Floyd is not planning to commit a criminal act that is likely to result in death or substantial bodily injury.

C. No, because the lawyer has reason to believe that it's necessary to prevent a criminal or fraudulent act.

D. No, because you are required to reveal confidential client information under these circumstances.

Is Floyd Mayweather, Jr. right?

A.

Yes. Money is right. It is not appropriate for you to disclose his confidential communications about jabbing Fiddy under these circumstances.

Explanation

Rule 1.6: Confidentiality of Information

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another ***and in furtherance of which the client has used or is using the lawyer's services***;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance ***of which the client has used the lawyer's services***;

Britney Spears has sued all members of her family residing in Kentwood, Louisiana, for intentional infliction of emotional distress on the grounds they have been leaking highly personal information about her mental state in what she believes is retaliation for winning her freedom from a conservatorship. Her sister, Jamie Lynn Spears, hires you to defend her, while her father, Jamie Spears, approaches your partner for representation. Your partner says “this is great, we’ll have Jamie blame Jamie Lynn and have Jamie Lynn blame Jamie. They can each waive conflicts. Britney will never be able to prove who is leaking her private life to the media, and she might get so crazed she needs her conservatorship reinstated, which is great for Jamie AND Jamie Lynn.”

Britney Spears, Carson, California on May 11, 2013 - Photo by Glenn Francis of www.PacificProDigital.com

Can you and your partner represent both Jamie Lynn and Jamie?

A. No, because there is a significant risk your representation to one client will be materially limited.

B. No, because the conflict is not waivable.

C. Yes, if both clients agree and give informed consent, confirmed in writing.

D. Yes, if you reasonably believe you can provide competent representation to both.

Can you and your partner represent both Jamie Lynn and Jamie?

B.

No, this proposal is toxic. The conflict is not waivable.

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer ***in the same litigation*** or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.10: Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless . . .

[Exceptions, including lawyers from prior firms who are properly screened]

Your client, Miramax, decides to terminate infamous CEO, Harvey Weinstein, for sexual harassment. Aware of the impending action, Harvey uses his Miramax email to communicate with his personal attorney regarding the dispute, and to see if she wants to meet at his hotel room around 11 pm to discuss it. Miramax terminates Harvey and, also, reviews Harvey's emails. Harvey claims his emails with his attorney are privileged. Miramax says its policy states email should only be used for business purposes and are property of the Company. Harvey never signed the acknowledgement of policy, but as CEO and as a supervisor, he required others to do so.

Are Harvey's emails privileged?

Are Harvey's emails privileged?

It may make Harvey scream (and push people) but, no, the emails are not privileged.

- Harvey had constructive notice of Miramax policy on emails.
- He did not make the communications in confidence.
- Court compared employees emailing from employee email to sending email while third party looks over shoulder.
- Waiver is not an issue because email was not privileged.

Communications must be intended to be confidential, and courts will scrutinize circumstances related to communication.

Scott v. Beth Israel Med. Ctr., Inc., 847 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007).

Employee Communications on Behalf of Company

- Two tests for whether an employee's communications are privileged:
  - Control group test (minority rule)
    - Employee must have authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of client.
  - Subject matter or "scope of employment" test (majority rule)
    - Employee engages in communication while acting in scope of employment for client for purposes of effectuating legal advice for client.
- Privilege may be waived by certain employees:
  - Under the minority rule, an employee whose documents were withheld as privileged can waive the privilege over those documents even though the privilege belongs to the Company.
  - Under the majority rule, only employees who are authorized to make decisions regarding privilege can waive the privilege.

You are in-house counsel to Netflix, which is involved in contract negotiations with Dave Chappelle. You instruct your paralegal to email your contract revisions to the Associate Vice President, two other in-house attorneys, and two non-legal employees with knowledge of the negotiations. The email requests feedback from the email recipients and reveals that this time, Netflix is willing to pay $50 million per special for 4 specials.

Is the email privileged?

Is the email privileged?

Yes, the email is privileged, and your client's "bottom line" is safe.

Explanation

- Email was primarily concerned with provision of legal advice.
- Paralegal was acting as in-house attorney's agent.
- Recipients of email were limited to people on need-to-know basis – employees involved in negotiation of contract

Legal staff can act as in-house counsel's agent for purposes of privileged communications.

The recipients of communications should be narrowly tailored to facilitate the likelihood of a finding that a communication is legal advice (as opposed to business advice).

Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253 (E.D. Pa. 2008)

You are in-house counsel for Get Dem Critters, Inc., a company in a heavily-regulated industry (chemicals) which expects regulatory action by governmental agencies. You email employees to discuss your interpretation of an existing regulation and to give legal advice regarding how a company should respond to agency inquiries.

Is the email privileged?

Is the email privileged?

No, no way to burrow down in the privilege.

A. The primary purpose of your email was not legal.

B. Email, instead, constituted business advice for a company in working regulated industry.

C. "The fact of extensive or pervasive regulation does not make the everyday business activities legally privileged from discovery."

D. The Court relied heavily on the Company's burden to show privilege.

Court rulings on privilege are highly factually specific.

Even in businesses that are heavily regulated, privilege is the exception and not the rule.

Rowe v. E.I. DuPont de Nemours & Co., Nos. 06-1810-RMB-AMD, 06-3080, RMB-AMD, 2008 WL 4514092 (D.N.J. Sep. 30, 2008)

Fact Pattern 18

You work as in-house counsel for Peach, a publicly traded technology company. In a meeting with Peach's CEO, Jim Chef, you find out that the SEC and DOJ are about to investigate the Company for one of Jim's tweets about the market and fixing Peach's in-the-pits valuation. You attend drinks with in-house counsel for a large Peach institutional shareholder. Though no public announcement has been made, you mention that the Company will soon be under investigation.

Did you violate any ethics rules?

A. No, because lawyers have a duty to share information with institutional shareholders when asked.

B. No, because your statements constituted public disclosure of a material fact, as required by securities laws.

C. Yes, because you revealed confidential information.

D. Yes, but only if the CEO instructed you not to disclose the information.

Did you violate any ethics rules?

C.

Yes. Nothing fuzzy about this quandary because you revealed confidential information.

A lawyer is generally may not reveal confidential information of a client to anyone other than the client, the client's representatives, or law firm personnel.

Confidential information includes all information relating to a client, furnished by the client or acquired by the lawyer during the course of or by reason of the representation of the client.

Federal securities law requires that all publicly traded companies disclose material information to all investors at the same time. This requirements applies to the public issuer and any "person acting on behalf of the issuer."

Reminder: Protecting the Privilege

- Communicate orally about sensitive issues.
- Label privileged communications.
- Explain purpose of communication.
- Limit number of recipients.
- Use separate email threads for legal issues.
- Reference the common interest of affiliated entities.
- Work with IT department to safeguard privilege.
- Research law of relevant jurisdictions.

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